80-1644

No.

Office-Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

STATE OF FLORIDA,

Petitioner,

v.

CHARLES HUGH BROWN,

Respondent.

Petition for a Writ of Certiorari to the District Court of Appeal, First District, State of Florida

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the District Court of Appeal, First District, State of Florida, erred in holding that this Court's decision in Payton v. New York, 445 U.S. ____, 63 L.Ed.2d 639, 100 S.Ct. 1371 (1980), was applicable to the instant case merely because this Court vacated that court's decision and remanded the cause for further consideration in light of Payton v. New York, supra.

2. Whether the District Court of Appeal, First District, State of Florida, erred in holding that Payton v. New York, supra, was retroactive and applicable to this case when the arrest and seizure was effected prior to the filing of the opinion in Payton.

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PETITION FOR WRIT OF CERTIORARI

The Attorney General of the State of Florida petitions this court for a writ of certiorari to review the judgment of the District Court of Appeal, First District, State of Florida.

OPINIONS BELOW

The original opinion of the lower court, not reported, was filed June 15, 1977 and is reproduced as Appendix A; a motion for rehearing was denied and a motion for stay of mandate was granted by order of the lower court entered July 25, 1977.

The opinion of the lower court handed down after remand by this Court for further consideration in light of Payton v. New York, supra, is reported at 392 So.2d 280 and reproduced as Appendix B. The order of this Court entered April 21, 1980

remanding for further consideration in light of Payton is reproduced as Appendix C. Motion for rehearing was denied by order of February 3, 1981 and is reproduced as Appendix D.

GROUNDS ON WHICH JURISDICTION IS INVOKED

The opinion and judgment of the District Court of Appeal, First District, Florida, was entered on December 2, 1980, rehearing denied February 3, 1981.[1] This petition is timely filed within 60 days of that date. Jurisdiction is invoked pursuant to 28 U.S.C. § 1257(3).

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[1] The State of Florida did not seek discretionary review in the Supreme Court of Florida because it had previously sought such review in that court in the case of State v. Santamaria, ____So.2d____(Fla. 1980), to review Santamaria v. State, 385 So.2d 1130 (Fla.1st DCA 1980), and review was denied. Moreover, under Nash v. Florida Industrial Commission, 389 U.S. 235 (1967), attempting to obtain review before that court is unnecessary since review, as a matter of right, is unavailable under Florida law. Fla.R.App.P. 9.030(a)(1),(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. Section 901.15, F.S., provides in pertinent part:

> 901.15 When arrest by officer without warrant is lawful.--A peace officer may arrest a person without a warrant when:
>
> (2) A felony has been committed and he reasonably believes that the person committed it.
>
> (3) He reasonably believes that a felony has been or is being committed and reasonably believes that the person to be arrested has committed or is committing it.

STATEMENT OF THE CASE

By amended information filed June 19, 1975, respondent was charged in three counts with violations of the Florida Comprehensive Drug Abuse Prevention and Control Act. The amended information is reproduced as Appendix E. Respondent filed a motion to suppress which was denied by order of the trial court entered July 11, 1975 following an evidentiary hearing. A jury trial was commenced on October 6, 1975. However, after the jury was selected, respondent elected to abandon his trial and enter a plea of nolo contendere reserving his right to appeal the order denying the motion to suppress. The trial judge sentenced respondent to five (5) years on Count I and five (5) years on Count II to run consecutively to the sentence imposed on Count I. Notice

of appeal was timely filed November 4, 1975.

The original per curiam opinion affirming the order of the trial judge denying the motion to suppress was filed June 15, 1977 (Appendix A) and is not reported. Rehearing was denied July 25, 1977, and a motion for stay of mandate was granted on the same date.

Respondent's petition for certiorari filed in the Florida Supreme Court was denied on December 8, 1977, rehearing denied and motion for stay pending review was granted February 20, 1978, reported at 355 So.2d 12. On March 27, 1978, the Florida Supreme Court issued a second order staying the issuance of mandate by the District Court of Appeal, First District, Florida.

A petition for writ of certiorari was filed in this Court on May 18, 1978 (Case No. 77-6769) and by order dated April 21, 1980, this Court remanded the cause for further consideration in light of *Payton v. New York,* 445 U.S._____(1980). This Court's order of remand is reported at 64 L.Ed.2d 254. This Court by order entered May 25, 1978 continued the stay order previously entered by the Florida Supreme Court on March 27, 1978. An additional stay order was entered by this Court on May 31, 1978. Following remand by this Court, the District Court of Appeal, First District, Florida, after further consideration in light of *Payton v. New York, supra,* handed down its decision on December 2, 1980 (Appendix C), reversing the order of the trial judge denying the motion to suppress. The

basis for the lower court's holding is that *Payton* was controlling and must be given retrospective application because of this Court's order remanding for further consideration in light of *Payton*.

REASONS FOR GRANTING THE WRIT

A. The District Court of Appeal, First District, Florida, erred in its determination that this Court's order of remand for further consideration in light of *Payton* required that *Payton* be given retroactive application.

The lower court in its opinion (Appendix C) rendered in this cause after further consideration in light of *Payton v. New York, supra,* had this to say:

> Appellee contends that Payton should not be applied retrospectively. This contention is without merit. See Busch v. State, 392 So.2d 272 (Fla. I DCA, 1980).

392 So.2d at 284. The reasoning of the lower court in support of its retrospective application of *Payton* in *Busch* is

set forth as follows:

> We have considered the state's contention that Payton should not be given retrospective application and find it to be without merit. The United States Supreme Court would not have vacated the judgment in this case and remanded it to this Court for further consideration in light of Payton if there had been no intention on the part of the Supreme Court that Payton be applied in this case, which was not final and was pending in the Supreme Court at the time its opinion in Payton was rendered.

392 So.2d at 274.

The retrospective application of *Payton* by the lower court in the instant case based on its reasoning in *Busch* that this Court intended that *Payton* be given retrospective application because *Brown v. Florida*, No. 77-6769, was remanded for further consideration in light of *Payton* is faulty. In *Chapman v. United States*, 547 F.2d 1240 (5th Cir. 1977), the Fifth Circuit had occasion to comment on this

point. Note the following:

> To be sure, it would be improper to conclude merely from the Supreme Court's remanding in light of Doyle that it intended Doyle to be fully retroactive.

547 F.2d 1247. In note 11, the court expanded on this point as follows:

> After all, the Court might have remanded so that the Sixth Circuit could consider precisely the question of retroactivity. For example, in United States v. Miller, 492 F.2d 37 (5th Cir. 1974), cert. denied, 422 U.S. 1056, 95 S.Ct. 2679, 45 L.Ed.2d 708 (1975), this court said that although the Supreme Court had vacated and remanded the previous panel decision in light of Almeida-Sanchez v. United States, 413 U.S. 266, 93 S.Ct. 2535, 37 L.Ed.2d 596 (1973), the Court's action on certiorari did not establish that the 1973 decision was retroactively applicable. The court's holding that Almeida-Sanchez was to be only prospectively applied was subsequently vindicated. See Bowen v. United States, 422 U.S. 916, 95 S.Ct. 2569, 45 L.Ed.2d 641 (1975); United States v. Peltier, 422 U.S. 531, 95 S.Ct. 2313, 45 L.Ed.2d 374 (1975).

547 F.2d at 1247. Similarly, in *United*

States v. Miller, 492 F.2d 37 (5th Cir. 1974), the court held that the action of this Court in vacating and remanding for further consideration in light of *Almeida-Sanchez v. United States*, 413 U.S. 266, 37 L.Ed.2d 596, 93 S.Ct. 2535 (1973), did not imply that the decision was necessarily retrospectively applicable to cases tried before it was decided, and the Fifth Circuit gave that decision only prospective application.

The decision of the lower court in *Busch* was also based upon dictum contained in *Linkletter v. Walker*, 381 U.S. 618, 14 L.Ed.2d 601, 85 S.Ct. 1731 (1965). It is emphasized that by relying on the dictum in *Linkletter*, the lower court disregarded the more recent decision of this Court in *Bowen v. United States*, 422 U.S. 916 (1975). In addition, the lower court either overlooked or failed to consider the clear

import of *Williams v. United States*, 401 U.S. 646 (1971), and *Michigan v. Payne*, 412 U.S. 47 (1973).

The import of the issue involved warrants a further discussion of *Bowen*. There, the defendant was stopped by border patrol authorities who discovered contraband in Bowen's vehicle which led to his conviction on certain drug related offenses in federal court. The Ninth Circuit affirmed his convictions and a petition for certiorari was filed in this Court. That petition was still pending when this Court announced its decision in *Almeida-Sanchez* which invalidated the use of roving patrols to search motor vehicles without either a warrant or probable cause at points removed from the border or its functional equivalent. Shortly thereafter, this Court granted Bowen's petition,

vacated the judgment below and remanded the cause to the Ninth Circuit for further consideration in light of *Almeida-Sanchez*. The Ninth Circuit considered whether the new rule of law promulgated in that case should be applied to events occurring before its announcement and concluded that the mandate of *Almeida-Sanchez* should not be applied to invalidate border patrol searches conducted prior to the date of that decision and reaffirmed Bowen's convictions. Please see *United States v. Bowen*, 500 F.2d 960 (9th Cir. 1974). The Ninth Circuit relied on *Williams v. United States* and *Michigan v. Payne, supra*, as authority for not applying *Almeida-Sanchez* to the "pipeline" cases, *i.e.*, cases on appeal, and remarked as follows:

The only remaining question is the date upon which *Almeida-Sanchez* would become applicable to searches at fixed checkpoints. Some would argue that there should be at least a limited retroactivity, requiring us to apply the new rule to those cases involving searches at fixed checkpoints that are now on direct appeal. These are the so-called "pipeline" cases. We reject this approach and hold that *Almeida-Sanchez* applies only to searches at fixed checkpoints after June 21, 1973, the date of the *Almeida-Sanchez* decision. The Supreme Court's recent decisions indicate that the pipeline theory does not enjoy majority approval. See *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967). The Court had *precisely that issue before it in Williams v. United States*, 401 U.S. 646, 91 S. Ct. 1148, 28 L.Ed.2d 388 (1971), and a majority declined to apply the new rule either to the cases in the *pipeline* (on direct appeal) or to the cases that were before the Court on collateral attack. Only Justices Brennan and Marshall supported the *pipeline* theory.

In *Michigan v. Payne*, 412 U.S. 47, 93 S.Ct. 1966, 36 L.Ed.2d 736 (1973), the Court again adopted limited prospectivity, *i.e.*, only the challenging appellant would benefit from the new rule. In *Payne*, the Court held that the prophylactic limitations

> established in *North Carolina v. Pearce*, 395 U.S. 711, 723-726, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), would not be applicable to resentencing proceedings that occurred prior to the date of the *Pearce* decision, even though Payne's appeal was in the pipeline when *Pearce* was decided. Justice Marshall, dissenting, concluded that "considerations of fairness rooted in the Constitution [require] that cases in the pipeline when a new constitutional rule is announced must be given the benefit of that rule." 412 U.S. at 60. None of the other justices joined in this part of his dissent and Justice Marshall himself admitted that, other than exceptions not applicable in this case, all "constitutional rules of criminal procedure have been given prospective effect only." 412 U.S. at 62 (footnote omitted). He noted that limited retroactivity, as applied in *Linkletter* [381 U.S. at 622], was an "anomaly." *It would be unwise for us to adopt the pipeline theory when the Court has declined to apply it.*

500 F.2d at 979-980. After the Ninth Circuit reaffirmed his convictions, Bowen again applied for certiorari to this Court. This Court, citing *Michigan v. Payne*,

supra, and *United States v. Peltier*, 422 U.S. 531 (1975), held that the Fourth Amendment exclusionary rule would not be served by applying the principles of *Almeida-Sanchez* retroactively and affirmed the decision of the Ninth Circuit.

The case of *State v. Carpentieri*, 414 A.2d 966 (N.J. 1980), is informative. There, the New Jersey Supreme Court had occasion to consider the retroactive application of *Deleware v. Prouse*, 440 U.S. 648 (1979), in which this Court held "random traffic stops" invalid. The New Jersey Supreme Court pointedly remarked that *Prouse* was decided after Carpentieri's arrest, conviction, and notice of appeal, but before the Superior Court, Appellate Division, resolution of his appeal. In reversing the Superior Court, Appellate Division, the New Jersey Supreme Court

held that *Deleware v. Prouse, supra,* applied only to those cases wherein the "random traffic stop" occurs after the date of the *Prouse* decision, March 27, 1979. The *Carpentieri* court found it necessary to discuss the order of this Court in *Kretchmar v. Nebraska,* 440 U.S. 978 (1979). Kretchmar's drug offense convictions were upheld by the Nebraska Supreme Court. *State v. Kretchmar,* 267 N.W. 2d 740 (Neb. 1978). Kretchmar petitioned this Court for certiorari. Approximately one week following the *Prouse* decision, this Court issued the following order in *Kretchmar:*

> On petition for writ of certiorari to the Supreme Court of Nebraska. Petition for writ of certiorari granted, judgment vacated and case remanded to the Supreme Court of Nebraska for further consideration in light of *Deleware v. Prouse,* 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979). [*Kretchmar v.*

> *Nebraska*, 440 U.S. 978, 99 S.Ct. 1783, 60 L.Ed.2d 237 (1979).]

414 A.2d at 970. On remand, the Nebraska Supreme Court apparently concluded that its reconsideration of the case was limited to direct application of the new principles announced in *Prouse* and summarily reversed Kretchmar's convictions. *State v. Kretchmar*, 280 N.W.2d 46 (Neb. 1979). In discussing the action of the Nebraska Supreme Court in retrospectively applying *Prouse* to events transpiring long before the date *Prouse* was decided, the *Carpentieri* court had this to say:

> In any event, assuming the Nebraska Supreme Court felt that the mere fact the matter was remanded to it for reconsideration in light of *Prouse* mandated retroactive application of the *Prouse* rule, we must disagree with the course taken by that court. As we understand it, the Supreme Court was simply calling upon the Nebraska Supreme Court itself to resolve the issue of *Prouse's* retroactivity, that question obviously not

having been encompassed by Kretchmar's petition. The remand was thus entirely appropriate. See *United States v. Calandrella*, 605 F.2d 236, 250-53 (6th Cir. 1979), cert.den, 444 U.S. 991, 100 S.Ct. 522, 62 L.Ed.2d 420 (1980); C. Wright, *Law of Federal Courts* § 108 (3rd ed. 1976).

Lest there be any doubt on this score, *Bowen v. United States*, 422 U.S. 916, 95 S.Ct. 2569, 45 L.Ed.2d 641 (1975), should render the issue clear. In *Bowen*, the defendant was stopped by border patrol authorities who discovered contraband in Bowen's vehicle. This led to defendant's conviction on certain drug-related offenses in federal court. Following the affirmance of his convictions by the Ninth Circuit Court of Appeals, defendant petitioned for certiorari to the United States Supreme Court. That petition was still pending when the United States Supreme Court announced its decision in *Almeida-Sanchez v. United States*, 413 U.S. 266, 93 S.Ct. 2535, 37 L.Ed.2d 596 (1973), which invalidated the use of roving patrols to search motor vehicles with neither a warrant nor probable cause, at points removed from the border and its functional equivalents. Shortly thereafter, the Court granted Bowen's petition, vacated the judgment below

and remanded the matter to the Court of Appeals for further consideration in light of *Almeida-Sanchez v. United States* --precisely the procedure it subsequently utilized in the *Kretchmar* case. See *Bowen v. United States*, 413 U.S. 915, 93 S.Ct. 3069, 37 L.Ed.2d 1038 (1973).

Unlike the Nebraska Supreme Court, however, the Court of Appeals did not mechanically apply the rule of *Almeida-Sanchez*. Rather, it considered whether the new rule of law promulgated in that case was properly to be applied to events occurring before its announcement. Concluding that the mandate of *Almeida-Sanchez* would not be applied to invalidate border patrol searches conducted prior to the date of that decision, the Court of Appeals reaffirmed Bowen's convictions. See *United States v. Bowen*, 500 F.2d 960 (9 Cir. 1974).

Upon the grant of Bowen's subsequent petition for certiorari the United States Supreme Court determined that the Court of Appeals' determination of the retroactivity question had been correct and that the roving border patrol search prohibition of *Almeida-Sanchez* was not to be applied to cases, such as that of petitioner Bowen, involving border patrol searches conducted prior to the rendering of the

> *Almeida-Sanchez* decision. See *Bowen v. United States, supra,* 422 U.S. at 917-19, 95 S.Ct. at 2571-2572, 45 L.Ed.2d at 645-47.
>
> Hence, *Bowen* demonstrates that summary orders by the Supreme Court directing remand for reconsideration in light of new exclusionary rule decisions do not intimate the Court's view on the retroactivity of such new decisions. It would appear simply that the Nebraska Supreme Court may have a different view of the state of the law in this regard. For the reasons we have sought to explicate, we do not accept its view despite our profound respect for that tribunal.

414 A.2d at 970, 971.

The Florida statute authorizing felony arrests on probable cause was in full force and effect at the time of respondent's trial in October 1975. In construing § 901.15, F.S., the Florida Supreme Court in *State v. Perez,* 277 So.2d 778 (Fla. 1973), held that the statute authorizing felony arrests on probable cause

contains no exception for arrests in dwelling houses in the nighttime. Consequently, the warrantless probable cause arrest was not unlawful and the lottery tickets which were seen in the defendant's home by the officers should not have been suppressed. Petitioner relied on *State v. Perez, supra,* throughout the proceedings in the lower court and urged in its brief and petition for rehearing substantially the same arguments as set forth herein against the retrospective application of *Payton.*

It is submitted that the retrospective application *vel non* of *Payton* is a federal question and this Court has already rejected the "pipeline" theory. Therefore, the lower court was not free to disregard the decisions of this Court and assume that *Payton* was applicable to arrests and seizures that occurred prior to the date

that decision was filed. *Oregon v. Hass*, 420 U.S. 714 (1975).

A substantial federal question is presented by this petition as to the meaning and import of an order of this Court vacating a lower court decision and remanding for further consideration in the light of a written opinion by this Court, and particularly so where the federal question was decided by the lower court in a way that conflicts with prior decisions of this Court.

B. The District Court of Appeal, First District, Florida, erred in holding that *Payton v. New York, supra*, was retroactive and applicable to this case when the arrest and seizure was effected prior to the filing of the opinion in *Payton*.

Given the purpose of the exclusionary rule, to-wit: to deter future police misconduct, no useful purpose would or could be served by declaring *Payton* to be

retroactively applicable to cases involving arrests that occurred prior to the date it was filed. This Court's decision in *United States v. Peltier*, 422 U.S. 531 (1975), should control this issue. The *Peltier* majority, speaking through Mr. Justice Rehnquist, held that considerations of judicial integrity and of deterrents of unlawful police conduct, which were policies underlying the Fourth Amendment exclusionary rule, did not require the retroactive application of *Almeida-Sanchez v. United States*, *supra*, to searches conducted prior to the date of that decision. The reasoning of the *Peltier* majority in arriving at this conclusion is appropriate here. We quote:

> The teaching of these retroactivity cases is that if the law enforcement officers reasonably believed in good faith that evidence they had seized was admissible at trial, the "imperative of

judicial integrity" is not offended by the introduction into evidence of that material even if decisions subsequent to the search or seizure have broadened the exclusionary rule to encompass evidence seized in that manner. It would seem to follow a fortiori from the Linkletter and Fuller holdings that the "imperative of judicial integrity" is also not offended if law enforcement officials reasonably believed in good faith that their conduct was in accordance with the law even if decisions subsequent to the search or seizure have held that conduct of the type engaged in by the law enforcement officials is not permitted by the Constitution. For, although the police in Linkletter and Fuller could not have been expected to foresee the application of the exclusionary rule to state criminal trials, they could reasonably have entertained no similar doubts as to the illegality of their conduct. [Citations omitted.]

This approach to the "imperative of judicial integrity" does not differ markedly from the analysis the Court has utilized in determining whether the deterrence rationale undergirding the exclusionary rule would be furthered by retroactive application of new constitutional doctrines. See Linkletter v Walker, 381 US, at 636-637, 14 L Ed 2d 601, 85 S Ct 1731; Fuller v Alaska, 393 US,

at 81, 21 L Ed 2d 212, 89 S Ct 61; Desist v. United States, 394 US, at 249-251, 22 L Ed 2d 248, 89 S Ct 1030. In Desist, the Court explicitly recognized the interrelation between retroactivity rulings and the exclusionary rule: "[W]e simply decline to extend the court-made exclusionary rule to cases in which its deterrent purpose would not be served." Id., at 254 n 24, 22 L Ed 2d 248, 89 S Ct 1030.

. . . We likewise observed in Michigan v Tucker, 417 US, at 447, 41 L Ed 2d 182, 94 S Ct 2357:

> "The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force."

45 L.Ed.2d at 381, 382.

This Court's decision in *Payton* unmistakably announced a new rule respecting the warrantless arrest of persons within their own homes. Prior to *Payton*, law enforcement authorities had every right to rely upon the prior decision of the Florida Supreme Court in *State v. Perez*, *supra*. For example, the lower court originally upheld the judgment and sentence in *Busch v. State*, *supra*, in good-faith reliance on *Perez*. *See Busch*, 392 So.2d at 273.

It is submitted that the District Court of Appeal, First District, Florida, erred in applying *Payton* to arrests effected prior to the date that case was decided and in so doing resolved a substantial federal question in conflict with this Court's prior decisions concerning retroactivity.

CONCLUSION

Petitioner submits that the opinion and judgment of the lower court should be summarily vacated and remanded to that court with directions to decide whether *Payton, supra,* is retroactive or applicable to this case under the standards announced in *United States v. Peltier,* 422 U.S., at 538-539, and cases cited therein. Alternatively, the Court should issue its writ of certiorari for the purpose of deciding whether *Payton v. New York* should be given retroactive application.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA
JANUARY TERM, A.D. 1977.

CHARLES HUGH BROWN,

Appellant,

-v- CASE NO. AA-179

STATE OF FLORIDA,

Appellee.
_____/

Opinion filed June 15, 1977.

An appeal from the Circuit Court of Duval County. Clifford B. Shepard, Judge.

Norman J. Abood for Appellant.

Robert L. Shevin, Attorney General; and Wallace E. Allbritton, Assistant Attorney General, for Appellee.

PER CURIAM.

AFFIRMED.

BOYER, Chief Judge, McCORD and MILLS, JJ., CONCUR.

APPENDIX B

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

CHARLES HUGH BROWN,

Appellant,

CASE NO. AA-179

-v-

STATE OF FLORIDA,

Appellee.

_____/

Opinion filed December 2, 1980.

McCORD, J.

On June 15, 1977, we rendered our decision affirming the trial court without opinion on this appeal. Thereafter, upon appellant's petition, the Supreme Court of Florida denied certiorari and subsequently denied petition for rehearing. Appellant then petitioned the United States Supreme Court for writ of certiorari to review this court's decision and on April 21, 1980, that court

entered its order and mandate granting the petition for writ of certiorari, vacating our judgment and remanding the case to this court for further consideration in light of Payton v. New York, 445 U.S.____, 63 L.Ed.2d 639, 100 S.Ct. 1371 (1980). We subsequently received from the parties briefs on the applicability of Payton and in compliance with the Supreme Court's mandate have reconsidered this cause. We reverse and remand to the trial court for further proceedings.

The trial court adjudged appellant guilty of possession of more than five grams of marijuana with intent to sell and guilty of possession of a device, contrivance, instrument, or paraphernalia, to wit: a pipe, with intent that said device be used for unlawfully administering marijuana. The convictions were rendered following nolo contendere pleas by

appellant with reservation of his right to appeal the trial court's order denying his motion to suppress evidence. The evidence sought to be suppressed consisted of articles seized at appellant's home and premises at the time of the arrest of appellant and other persons and articles subsequently seized upon execution of a search warrant to search the "premises together with the yard and curtilage thereof . . ." Appellant contends the articles were unlawfully seized because the seizure resulted from an unlawful arrest; that the arrest of him and others in his home were unlawful because they were made without a warrant and without the existence of exigent circumstances to justify entering his home without a warrant.

As pointed out in Payton, Florida is

one of 24 states which have, until the Payton decision, permitted warrantless entry into the home to arrest even in the absence of exigent circumstances (63 L.Ed. 2d 658). By its ruling in Payton, the Supreme Court, for the first time, holds warrantless nonconsensual entry into a home for the purpose of making a routine felony arrest to be a violation of the Fourth Amendment of the United States Constitution in the absence of exigent circumstances justifying such entry. In so ruling, the Supreme Court said:

> But the critical point is that any differences in the intrusiveness of entries to search and entries to arrest are merely ones of degree rather than kind. The two intrusions share this fundamental characteristic: the breach of the entrance to an individual's home. The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of

> an individual's home--a zone that finds its roots in clear and specific constitutional terms: "The right of the people to be secure in their . . . houses . . . shall not be violated." That language unequivocally establishes the proposition that "[a]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable Government intrusion." Silverman v. United States, 365 US 505, 511, 5 L Ed 2d 734, 81 S Ct 679, 97 ALR2d 1277. In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.

We must consider the pertinent facts in the case sub judice in order to apply this new ruling of the United States Supreme Court.

Appellant, during the spring of 1975, was under surveillance by undercover police on suspicion of dealing in drugs in Jacksonville, Florida. The following is a summary of the undisputed evidence

presented at the hearing on the motion to suppress: Officer D. E. Taylor, working undercover, met Anthony J. Cataldo at approximately 10:30 p.m. on May 24, 1975. Cataldo advised that he had a large quantity of marijuana and Taylor said he was interested in purchasing 20 pounds. Cataldo would not take Taylor directly to the source but agreed to take him to a location near the source. Cataldo then directed Taylor to a location near the intersection of Valdura and 103rd Street, where Taylor gave him $820 front money with which to buy 20 pounds of marijuana. Cataldo advised that he would return in a few minutes with the marijuana. Taylor had an idea where Cataldo would obtain the marijuana and had a surveillance team, Officers Howell and Higginbotham, set up at the premises located at 6209 Shindler Drive, which Taylor believed to be

occupied by appellant. Taylor was in radio contact with the surveillance unit and he testified that he had reason to believe that appellant was involved in heavy drug traffic.

When Cataldo departed from the rendezvous to make the purchase, he advised that when he returned in a few minutes Taylor was to follow him down Valdura Street and that he (Cataldo) would pull off the road and turn the marijuana over to Taylor. The $820 front money that Taylor gave to Cataldo was marked in the sense that Taylor had the serial numbers for the bills. When Cataldo departed, Taylor so advised the surveillance unit and requested them to make contact if and when Cataldo arrived at 6209 Shindler Drive. Catlado was driving a green

Chevrolet Monza. In approximately a minute and a half to two minutes, the surveillance unit notified Taylor that Cataldo had pulled into the driveway of the premises at Shindler Drive. Officer Howell of the surveillance unit was situated across the street from the premises with a clear view. He observed the Monza enter the yard and drive up to the house. The driver exited the automobile and walked around to an area in the back of the house. A few minutes later, he reappeared with another individual and walked down beside the garage where Howell lost sight of them for three or four minutes. Then two individuals reappeared and walked up to the automobile. The taller of the two (not the person who drove up in the car) placed a bundle or package in the front from the driver's

side of the Monza. When the Monza left the premises, Officer Howell immediately radioed Officer Taylor and advised that the Monza was headed back in his direction. This was approximately 10 minutes from the time Cataldo had left Taylor. Approximately one-half to two minutes later Cataldo arrived at the rendezvous point, and Taylor followed him down Valdura Street at which time Cataldo turned six pounds of marijuana over to him. At this point, Taylor placed Cataldo under arrest and advised him of his rights.

After advising Cataldo of his rights, Taylor questioned him and Cataldo stated that he had been to the house on Shindler Drive where he got the marijuana from a man named Chuck Brown. Cataldo also told Taylor that Brown had told him that he had already sold 400 pounds of marijuana

that day. In addition to the six pounds of marijuana that Cataldo had in his possession for Taylor, he also had two $20 bills of the marked money that Taylor had given him to purchase the 20 pounds. Cataldo advised that he was paying $130 a pound for the marijuana and selling it for $160 a pound. Cataldo also advised that he could not see any additional marijuana at Brown's house but that Brown had told him he had at least 20 pounds because that was the amount that Taylor initially planned to buy.

As to the exact location on the premises from which the marijuana came, Cataldo said that it came from the garage. After placing Cataldo under arrest and searching him, Taylor next advised the surveillance unit that the buy had been consummated and that Cataldo had been

placed under arrest. Subsequently, Taylor telephoned the assistant state attorney, told him what had transpired and sought advice as to what should be done next. The assistant state attorney told Taylor that he believed there was sufficient probable cause to get a search warrant.

Following the phone call, Taylor and the other officers went to the premises at 6209 Shindler Drive. Taylor was the first officer to arrive. The premises were fenced with a gate at the driveway. Taylor drove through the gate and into the premises, and as he got out of the car, a man came out the back door of the house. [He subsequently discovered this man was Chuck Brown (appellant).] Upon exiting the car, Taylor was standing at the back of the house, and appellant was standing on a small back porch or stoop.

Taylor advised appellant of his identity and that he was under arrest.[1] At the

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[1]There is some confusion as to the exact spot where appellant was arrested. On direct examination, Taylor testified as follows:

> We drove into the driveway and as I got out of the car -- I was in the first car that arrived -- a man came out of the back door, a man I now know as Chuck Brown. I was standing right at the back door of the house. I advised him that we were police officers and he was under arrest and at that point I could smell burning marijuana from inside the residence. Somebody else was coming up behind me and they detained Mr. Brown. I went on into the residence and walked into a little dining room area that projects into the kitchen.

On cross-examination he testified:

> Q Where was Mr. Brown at the time you placed him under arrest?
>
> A He was in the kitchen. He was arrested at the back porch. We asked Mr. Brown to step inside so we could round up everybody involved so we would have them in one area so we could watch them.

same time, Taylor could smell burning marijuana from inside the residence. Another officer behind Taylor came up and detained appellant while Taylor entered the back door of the residence and walked into a small dining room area. At this point, Taylor saw four or five people sitting around a table, one of whom was smoking a marijuana cigarette. He advised all of the individuals that they were under arrest and then checked the rest of the house to determine whether anybody else was inside. He made no search of the house at that time but was simply looking for other individuals who might be in the house. All of the individuals were searched in the dining area, and marked bills initially given to Cataldo were

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For the purpose of our ruling, we consider that the arrest was either made or initiated on the back porch.

recovered from appellant's pocket. All of the individuals, with the exception of appellant, were transported to jail. Officers Howell and Higgenbotham remained with appellant until Taylor could return with a search warrant. None of the officers conducted any form of search of the house or garage until the search was subsequently made pursuant to a search warrant which was obtained by Taylor. Appellant told Taylor that he lived there and was the only person who lived there.

The search warrant was issued for the premises and the curtilage described in the warrant. The affidavit upon which the search warrant was issued was based entirely upon the circumstances of the marijuana buy which had been made at the premises by Cataldo. It did not mention the subsequent intrusion by the officers

into the premises and the arrest of the occupants.

Pursuant to the ruling of the United States Supreme Court in Payton, the arrests were unlawful in that they were made upon intrusion into appellant's home without a warrant. No exigent circumstances for entering the premises without a warrant have been shown to exist. Thus, under Payton, the motion to suppress should have been granted as to items seized upon the search of the individuals' persons and the immediate area made at the time of their arrest. These would include the marked bills and other unmarked money recovered upon search of the person of appellant when arrested. They would also include the roach clip which was in possession of the individuals around the table when the officer entered the kitchen, as

well as the yellow legal pad, also referred to as a tally sheet, which was recovered from one of the individuals at the kitchen table at the time of the arrest.

There was no error in denial of the motion to suppress other items which were seized upon execution of the search warrant. These items include 180 pounds of marijuana, marijuana plants, marijuana pipes, marked money found in a wallet in the bedroom of the house, two sets of scales, and marijuana found in a tin container on the kitchen table. It appears from the evidence that none of these items were discovered until the search was made pursuant to the search warrant. The fruit of the poisonous tree doctrine enunciated in Wong Sun v. United States, 371 U.S. 471, 9 L.Ed.2d 441, 83 S.Ct. 407 (1963), is not applicable to the warrant

search because the issuance of the warrant was not predicated in any way upon, and thus did not result from, the unlawful arrests. The evidence obtained upon the warrant search had an origin independent of the arrests and was in no way tainted by the arrests. The warrant was issued solely upon the information contained in the affidavit for search warrant showing probable cause to believe appellant's premises contained contraband. That information related only to the buy of marijuana by Cataldo and the circumstances surrounding it.

Appellee contends that Payton should not be applied retrospectively. This contention is without merit. See Busch v. State, Case No. GG-445, ____So.2d____(Fla. 1 DCA, opinion filed November 17, 1980).

Appellee also contends that Payton is not applicable to the factual situation

sub judice because appellant had stepped out of the back door of his house onto the porch when arrested; that the intent of Payton was to protect intrusion into one's home. We are unable to agree under the facts of this case. In this connection we have considered the somewhat similar case of United States v. Santana, 427 U.S. 38, 49 L.Ed.2d 300, 96 S.Ct. 2406 (1976). There an undercover officer arranged a heroin buy with an individual whom he immediately placed under arrest. The officer was then informed that the money was in the possession of one Mrs. Santana, who lived approximately two blocks away. The officers proceeded to Mrs. Santana's house in a van. When they arrived, they saw her standing in the doorway of her house with a brown paper bag in her hand. They pulled their vehicle to within 15 feet of where Mrs.

Santana was standing and got out of their van while shouting "police" and displaying their identification. As they approached, Mrs. Santana retreated into the vestibule of her house. The officers followed her through the open door and caught her in the vestibule. As she attempted to pull away, the paper bag which she was holding tilted and what appeared to be heroin in glazed paper packets fell to the floor. She was placed under arrest and subsequently charged with federal narcotics violations. The Supreme Court upheld the arrest holding:

> . . . a suspect may not defeat an arrest which has been set in motion in a public place, and is therefore proper under Watson [United States v. Watson, 423 U.S. 411 (1976)] by the expedient of escaping to a private place.

The two questions which the court considered were (1) whether, when the police first sought to arrest Santana, she was in a public place; and (2) whether her act of retreating into her house could thwart an otherwise proper arrest. As to the first question, the court concluded that Mrs. Santana "was not in an area where she had any expectation of privacy." The court stated, "She was not merely visible to the public but she was as exposed to public view, speech, hearing, and touch as if she had been standing completely outside her house." In contrast to Santana, the officers in the case sub judice drove into Brown's enclosed yard at approximately 1:45 a.m. and arrested him when he came out on his back porch. Both the officers and Brown were in a place where Brown, particularly at that

time of night at his back door, could expect privacy. He was on his back porch, a part of his house, and the officers had driven into his enclosed private yard. On the other hand, in the Santana opinion, there is no indication that the officers drove into an enclosure of Mrs. Santana's premises. The only logical conclusion we can reach from the opinion is that, unlike the case sub judice, the officers did not drive their vehicles onto private property to reach the house but set the arrest in motion from the public street.

We reverse with directions to grant the motion to suppress insofar as it seeks suppression of the evidence seized upon the arrest of appellant and the other individuals and to deny the motion in other respects. Reversed and remanded for further proceedings consistent

herewith.

MILLS, Chief Judge, and Smith, L., J.
CONCUR.

APPENDIX C

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

April 21, 1980

Wallace E. Allbritton, Esq.
Assistant Attorney General
The Capitol
Tallahassee, FL 32304

RE: Charles Hugh Brown
v. Florida
No. 77-6769

Dear Mr. Allbritton:

The Court today entered the following order in the above-entitled case:

> The motion of petitioner for leave to proceed in forma pauperis and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the District Court of Appeal of Florida, First District, for further consideration in light of Payton v. New York, 445 U.S. _____(1980).

Very truly yours,

MICHAEL RODAK, JR.,
Clerk

by

Francis J. Lorson
Deputy Clerk

APPENDIX D

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

February 3, 1981

CASE NO. AA-179

CHARLES HUGH BROWN VS. STATE OF FLORIDA

Appellant, Appellee.

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

The following action was taken in the above styled case on the above date:

Motion for Rehearing denied.

By Order of the Court

RAYMOND E. RHODES,
CLERK

I HEREBY CERTIFY that a true and correct copy of the above was mailed this date to the following:

Theodore L. Tripp, Jr. of Simon, Schindler & Tripp, Miami, FL; Norman J. Abood, Esq., Jacksonville, FL; Richard C. McFarlain, Esq., Tallahassee, FL; Wallace E. Allbritton, Assistant Attorney General, Tallahassee, FL.

_____
Deputy Clerk

APPENDIX E

CASE NO. 75-1541 DIVISION Q

Statute: 893.13(1)(a)

In The Circuit Court
Of The Fourth Judicial Circuit of Florida
in and for
The County of Duval, State of Florida

Spring Term 1975

STATE OF FLORIDA,

vs.

CHARLES HUGH BROWN and
CHESTER WILLIAM SERGENT

AMENDED INFORMATION FOR

POSSESSION WITH INTENT TO SELL, POSSESSION OF CONTROLLED SUBSTANCE PARAPHERNALIA, SALE OF A CONTROLLED SUBSTANCE

In the Name of and by Authority of the State of Florida

ED AUSTIN, State Attorney for the Fourth Judicial Circuit of the State of Florida, in and for Duval County, charges that CHARLES HUGH BROWN and CHESTER WILLIAM SERGENT

on the 25th day of May, 1975, in the County of Duval and State of Florida, did unlawfully possess a controlled substance as named or described in Section

893.03(1)(c), to-wit: more than five (5) grams of CANNABIS, with the intent to sell, contrary to Section 893.13(1)(a)2, Florida Statutes.

SECOND COUNT

And for a second count of this information your informant further charges that CHARLES HUGH BROWN, on the 25th day of May, 1975, in the County of Duval and State of Florida, did unlawfully possess or have under his control, a device, contrivance, instrument, or paraphernalia, to-wit: a pipe, with the intent that said device, contrivance, instrument or paraphernalia be used for unlawfully administering a controlled substance, CANNABIS, as named or described in Section 893.03 (1)(c), Florida Statutes, contrary to Section 893.13(3)(a)4 and 893.13(3)(b), Florida Statutes.

THIRD COUNT

And for a third count of this information your informant further charges that CHARLES HUGH BROWN, on the 25th day of May, 1975, in the County of Duval and State of Florida, did unlawfully sell a controlled substance as named or described in Section 893.03(1)(c), Florida Statutes, to-wit: CANNABIS,

contrary to the provisions of Section 893.13(1)(a)2, Florida Statutes.

ED AUSTIN, STATE ATTORNEY

BY: F. Joseph Dubray, Assistant State Attorney

Office-Supreme Court, U.S.
FILED
APR 30 1981
ALEXANDER L. STEVAS,
CLERK

NO. 80-1644

In the Supreme Court of the United States

OCTOBER TERM, 1980

STATE OF FLORIDA,

Petitioner,

vs.

CHARLES HUGH BROWN,

Respondent.

Brief in Opposition to Petition For Writ of Certiorari to the District Court of Appeal, First District, State of Florida

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SIMON, SCHINDLER & TRIPP, P.A.
1492 South Miami Avenue
Miami, Florida 33130
Tel: (305) 358-8611
Attorneys for Respondent

BY: Theodore L. Tripp, Jr.

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INTRODUCTION

Respondent accepts Petitioner's identification of Questions Presented for Review and presentation of the Statement of the Case.

SUMMARY OF ARGUMENT

The action taken by the District Court of Appeal of Florida, Third District, in applying the case of *Payton v. New York*, 445 U.S. 573, 63 L.Ed.2d 639, 100 S.Ct. 1371 (1980), on remand from the United States Supreme Court was eminently correct. The issue raised by Petitioner in its Petition for Writ of Certiorari is totally inapplicable to the facts of this case in light of *Payton*.

The *Payton* decision is outside the ambit of those categories of cases which may appropriately be given prospective application only. While *Payton* undeniably established a new principle of law, it neither overruled past precedent nor decided an issue of first impression whose resolution was not clearly foreshadowed. A review of the decision itself satisfactorily supports this contention.

The law is clear that, in the absence of a Supreme Court holding to the contrary, intervening decisions shall be given retrospective application and not limited to prospective application only. *Payton* has in fact already been applied in several cases at both the state and federal level. Indeed, this Court in December 1980 denied a petition for writ of certiorari on the precise question of whether the Arkansas Supreme Court erred in applying *Payton* to a case on direct review at the time of *Payton's* rendition.

Inasmuch as *Payton* was not applied retroactively or, if applied retroactively, was appropriately applied, this Court should deny the requested writ and allow the cause to proceed in accordance with the ruling of the district court.

ARGUMENT

THE STATE DISTRICT COURT OF APPEAL CORRECTLY APPLIED THE CASE OF *PAYTON V. NEW YORK* IN ITS CONSIDERATION OF THIS CAUSE ON REMAND FROM THE UNITED STATES SUPREME COURT.

A. *Payton v. New York* does not fall within those categories of cases which may be given prospective application only.

Had Petitioner's thoughtful and persuasive argument been presented to this Court in a different case, the argument and remedy sought might well have been appropriate and successful. Based upon the procedural facts herein, however, as well as existing case law, Petitioner's argument is without merit and provides no basis for issuance of the requested writ.

The issue of retrospective application arises only when the intervening decision by this Court establishes a new principle of law "either by overruling clear past precedent or by deciding an issue of first impression whose resolution was not clearly foreshadowed." *Chevron Oil Co. v Huson*, 404 U.S. 97, 106, 92 S.Ct. 349, 355, 30 L.Ed.2d 296 (1971). The intervening decision which is applicable in this cause, *Payton v. New York*, 445 U.S. 573, 63 L.Ed.2d 639, 100 S.Ct. 1371 (1980), was none of these. As evidenced by the language of the decision itself, it did not establish a new principle of law either by overruling clear past precedent or by deciding an

issue of first impression whose resolution was not clearly foreshadowed.[1]

Without question, *Payton* established a new principle of law: the Fourth Amendment prohibits police from making warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest in the absence of exigent circumstances. What remains to be determined, before deciding whether *Payton* should be prospectively applied only, is whether the decision as announced by this Court overruled clear past precedent or decided an issue of first impression whose resolution was not clearly foreshadowed.

It is evident from a review of the case that *Payton* did not overrule any past precedent, clear or otherwise. As initially noted by Mr. Justice Stevens, writing for the majority, there was no clear precedent governing this issue:

> *The important constitutional question presented by this challenge has been expressly left open in a number of our prior opinions.* In *United States v. Watson*, 423 U.S. 411, 96 S.Ct. 820, 46 L.Ed.2d 598, we upheld a warrantless "midday public arrest," expressly noting that the case did not pose "the still unsettled question . . . whether and under what circumstances an officer may enter a suspect's home to make a warrantless arrest." 423 U.S., at 418, n. 6, 96 S.Ct., at 85, n. 6. [Footnote omitted.]

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[1] *See generally* Annot., *Prospective or Retroactive Operation of Overruling Decision*, 10 ALR 3rd 1371.

100 S.Ct. at 1374 (emphasis added).

As to the second alternative requirement — whether the case decided an issue of first impression whose resolution was not clearly foreshadowed — it is indeed apparent that *Payton* decided an issue of first impression. The decision itself nevertheless makes clear that its resolution was also "clearly foreshadowed."

In his extensive historical analysis of Fourth Amendment law, Justice Stevens stated that it was "a 'basic principle of Fourth Amendment law' that *searches and seizures inside a home without a warrant are presumptively unreasonable.*" 100 S.Ct. at 1380 (footnote omitted; emphasis added). He further noted that, of the seven United States Courts of Appeal that have considered the issue of warrantless arrests in the home, five have expressed the opinion that such arrests are unconstitutional. *Id.*

Further evidence of the fact that the decision in *Payton* was clearly foreshadowed is given in the Court's analysis of states' decisions on the issue:

> But these current figures reflect a significant decline during the last decade in the number of States permitting warrantless entries for arrest. Recent dicta in this Court raising questions about the practice, see n. 1 *supra*, and Federal Courts of Appeals' decisions on point, see n. 4, *supra*, have led state courts to focus on the issue. Virtually all of the state courts that have had to confront the constitutional issue directly have held warrantless entries into the home to arrest to

> be invalid in the absence of exigent circumstances. See nn. 2, 3, *supra.* Three state courts have relied on Fourth Amendment grounds alone, while seven have squarely placed their decisions on both federal and state constitutional grounds. A number of other state courts, though not having had to confront the issue directly, have recognized the serious nature of the constitutional question. Apparently, only the Supreme Court of Florida and the New York Court of Appeals in this case have expressly upheld warrantless entries to arrest in the face of constitutional challenge.

Id. at 1387 (footnotes omitted).

Justice Stevens throughout the opinion quoted extensively from other justices and judges in support of the rationale underlying *Payton* — that an entry to arrest and an entry to search for and to seize property implicate the same interest in preserving the privacy and the sanctity of the home and justify the same level of constitutional protection. He noted:

> This reasoning has been followed in other circuits. [Footnote omitted.] Thus, the Second Circuit recently summarized its position:
>
> > "To be arrested in the home involves not only the invasion attendant to all arrests but also an invasion of the sanctity of the home. This is simply too substantial an invasion to allow without warrant, at least in the absence of exigent circumstances, even when it is accomplished under

> statutory authority and when probable cause is clearly present." *United States v. Reed*, 572 F.2d 412, 423 (CA2 1978), cert. denied, 439 U.S. 913, 99 S.Ct. 283, 58 L.Ed.2d 259.
>
> *We find this reasoning to be persuasive and in accord with this Court's Fourth Amendment decisions.*

Id. at 1381 (emphasis added).

The rationale of *Payton*, therefore, is undeniably apparent: the decision flows from previous decisions of the Court itself, and merely established as the law of the United States the very law which the majority of state and federal courts have been following for several years. As such, it is not an intervening decision which established a new principle of law that either overruled past precedent or decided an issue of first impression whose resolution was not clearly foreshadowed. The questions raised by Petitioner as to the alleged retrospective application of *Payton* to the case sub judice are accordingly inapposite to the court's action below.

B. *Payton v. New York* has already been applied in other state and federal cases and has received the attention of this Court on the very issue of retrospective application.

Since this Court's decision in *Payton* on April 15, 1980, several United States Courts of Appeal have applied *Payton* in deciding cases pending before them.

In *United States v. Acevedo*, 627 F.2d 68 (7th Cir. 1980), for example, the Seventh Circuit Court of Appeals considered whether a defendant's arrest, executed after forcible entry into his home without a warrant, was lawful in light of *Payton:*

> On February 23, 1979, agents of the Drug Enforcement Administration forcibly entered Bernardino Acevedo's apartment without a warrant and therein arrested him. On April 15, 1980, the United States Supreme Court held violative of the fourth amendment warrantless nonconsensual entries to effect in-home arrests in the absence of exigent circumstances. *Payton v. New York*, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980). Consequently, the issue we face is whether the agents entered Acevedo's apartment under circumstances that may properly be characterized as exigent, that is, requiring immediate action.

Id. at 68-69.

The Court found that exigent circumstances had in fact existed, obviating the need for a warrant in light of *Payton*, and thereby affirmed the conviction below.[2]

Furthermore, the question of the appropriateness of retroactively applying *Payton* has already been presented to the Court in another case in which the

[2]For other examples of application of *Payton* by federal appellate courts, *see United States v. Velasquez*, 626 F.2d 314 (3rd Cir. 1980); *Wanger v. Bonner*, 621 F.2d 675 (5th Cir. 1980). *See also Wallace v. King*, 626 F.2d 1157 (4th Cir. 1980).

Court declined to address the issue. In *Arkansas v. Haynes*, Case No. 80-691 (filed October 24, 1980), a case factually similar to the instant one and to *Payton* and *Riddick v. New York*, 445 U.S. 573, 63 L.Ed.2d 639, 100 S.Ct. 1371 (1980), the Arkansas Supreme Court supressed certain evidence obtained during a warrantless, forcible, and nonconsensual entry into a motel room on the authority of *Payton*. The court specifically stated: "It is obvious that this case [*Payton*] is controlling on the matter before us at this time." *Haynes v. State*, 602 S.W.2d 599, 602 (Ark. 1980). The State then filed a petition for writ of certiorari in this Court, framing the following questions:

> (1) Did Arkansas Supreme Court erroneously interpret and apply *Payton v. New York* in reversing defendant's conviction because of evidence seized pursuant to valid search warrant but after officers made warrantless arrest of defendant in his motel room?
>
> (2) Did Arkansas Supreme Court err in reversing his conviction in light of *Rawlings v. Kentucky*, 48 LW 4885 (1980), which Arkansas court did not consider?

49 U.S.L.W. 3432.

On December 16, 1980, this Court summarily denied the Petition without opinion. 49 U.S.L.W. 3443.

While the *Haynes* case was before this Court for less than two months, the instant case, in contrast, was pending on Petition for Writ of Certiorari for almost

two years.[3] To give no credence to the issue of retrospective application of *Payton* in *Haynes*, while allowing such consideration herein, would work an extreme injustice on Mr. Brown and would be highly inequitable.

Payton is being and has been unquestioningly applied to cases which are already pending on direct review at the time this Court rendered its decision in *Payton*. It would therefore appear that this Court has impliedly sanctioned such application and in fact does not deem it retrospective, as posited in Part A *supra*.

C. A decision from this court to allow consideration of the issue of the retroactivity of *Payton* as it applies to this case would effect a grave injustice not in accord with prior case law in similar circumstances.

At the time of this Court's decision in *Payton*, this cause was pending before the Court on a petition for writ of certiorari on the precise question addressed and answered in *Payton*.[4] With facts remarkably similar to *Payton*, *Brown v. Florida* could well have been the companion case to *Payton* instead of *Riddick v. New York*, *supra*. The only notable difference is that the facts in *Payton* and *Riddick* are more egregious: the

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[3]Mr. Brown filed his Petition for Writ of Certiorari in this Court on May 18, 1978. The Court's Order granting the Petition and remanding the cause for further consideration in light of *Payton* was issued on April 21, 1980.

[4]At the time the decision in *Payton* was announced, in fact, the instant case had been pending before this Court for approximately two years.

warrantless entry into Brown's home occurred in the middle of the night, as opposed to the daytime entries in *Payton* and *Riddick*, and the felony thought to have occurred involved possession of marijuana with intent to sell, as opposed to murder and armed robbery, respectively.

Mere prospectivity of decisions with respect to constitutional rights should be the exception and not the rule. *Chapman v. United States*, 553 F.2d 886 (5th Cir. 1977); *Valencia v. Anderson Bros. Ford*, 617 F.2d 1278 (7th Cir. 1980). There could be no retroactive application of *Payton* by the lower court in this cause inasmuch as this case was in the identical procedural posture as *Payton* and had raised before this Court the identical issue of unconstitutionality of warrantless and nonconsensual entries into a suspect's home in the absence of exigent circumstances. Had this case been pending before an appellate court following trial of the matter, then the issue of retroactive application of *Payton* may appropriately have been raised.

In *United States v. Peltier*, 422 U.S. 531, 45 L.Ed.2d 374, 95 S.Ct. 2313 (1975), for example, the case was on appeal to the United States Court of Appeals for the Ninth Circuit at the time this Court announced its decision in *Almeida-Sanchez v. United States*, 413 U.S. 266, 37 L.Ed.2d 596, 93 S.Ct. 2535 (1973). Upon the Government's concession that the search and seizure in *Peltier* were unconstitutional under the *Almeida-Sanchez* decision, the Court of Appeals reversed Peltier's judgment of conviction. On certiorari to this court, it was held that the Fourth Amendment exclusionary rule did not require the *Almeida-Sanchez* decision to

be applied retroactively to cases involving searches prior to the date of that decision.[5]

The case of *United States v. Fitzgerald*, 545 F.2d 578 (7th Cir. 1976), is instructive on the issue of retroactive application. In considering whether the decision of *Beckwith v. United States*, 425 U.S. 341, 96 S.Ct. 1612, 48 L.Ed.2d 1 (1976), should be applied in a case which was on appeal at the time the *Beckwith* decision was rendered, the Seventh Circuit Court of Appeals noted:

> The petition for rehearing points out that the Supreme Court has on a number of recent occasions held that a newly announced constitutional rule need not be applied in cases where trials had already been commenced. The petition urges that we therefore are not bound by the rule of *Schooner Peggy* and should make our determination as to the retroactivity of *Beckwith v. United States*, 425 U.S. 341, 96 S.Ct. 1612, 48 L.Ed.2d 1 (1976).
>
> This assertion is incorrect. When the Supreme Court holds that a new rule of law should be applied only prospectively, it is itself delineating

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[5]For other examples of cases on direct review at the time this Court rendered a significant decision enunciating a new legal standard or theory relevant to the case but held prospective in application only, *see Michigan v. Payne*, 412 U.S. 47, 36 L.Ed.2d 736, 93 S.Ct. 1966 (1973); *Williams v. State*, 401 U.S. 646, 29 L.Ed.2d 388, 91 S.Ct. 1148 (1971); *Jenkins v. Georgia*, 418 U.S. 153, 41 L.Ed.2d 649, 94 S.Ct. 2750 (1974); *Robinson v. Neal*, 409 U.S. 505, 35 L.Ed.2d 29, 93 S.Ct. 876 (1973); *Johnson v. New Jersey*, 384 U.S. 719, 16 L.Ed.2d 882, 86 S.Ct. 1772 (1966).

the substantive scope of that rule. As a conceptual matter, the Court is holding that its new rule is not the law with respect to cases that have already been initiated. In contrast, *when the Supreme Court announces a new rule of law after a district court has ruled but before a court of appeals has passed on a case, the court of appeals can place no such substantive limitation on the scope of the new rule. If the Supreme Court fails to limit the substantive scope of its new rule to purely prospective cases, the court of appeals as an inferior court must assume that the rule applies in all situations.* The policy factors that the Supreme Court relies on in determining whether its rules should have merely prospective effect are irrelevant, though they would not be if the court of appeals were determining whether to give retrospective effect to a new rule which it had itself announced.

Moreover, the Supreme Court has recently affirmed the viability of the *Schooner Peggy* doctrine. In *Thorpe v. Durham Housing Authority*, 393 U.S. 268, 281-82, 89 S.Ct. 518, 526, 21 L.Ed.2d 474 (1969), the Court held that an appellate court confronted with a change in the law "must apply the law in effect at the time it renders its decision," whether the change was constitutional, statutory, or judicial. Furthermore, this principle governs whether or not the new law is made specifically applicable to pending cases. See *Bradley v. Richmond School Board*, 416 U.S. 696, 711-16, 94 S.Ct. 2006, 40 L.Ed.2d 476 (1974).

Id. at 582 (emphasis added).

The clear understanding of practitioners before this Court is that the entry of an order by this Court which grants a writ of certiorari and remands the cause to the lower appellate court for reconsideration of the issues in light of an intervening Supreme Court case means exactly that: the law of the intervening case should be applied and considered when reanalyzing the case itself. This is the basis for the view set forth by Stern & Gressman, leading commentators on Supreme Court practice:

> The Court may grant a petition for certiorari and at the same time summarily reverse the judgment and remand the case for further proceedings. Such summary action occurs when the Court, or a majority thereof, is convinced that the decision below is so clearly erroneous as to make oral argument a waste of time. Most commonly this results because the Court believes the case to be clearly controlled by one or more of its own recent decisions . . . . [Footnote omitted.] And sometimes the Court will summarily vacate and remand in order to permit the lower court to reconsider its ruling in the light of a new Supreme Court decision. [Footnote omitted.]

Stern & Gressman, *Supreme Court Practice*, §5.12 at 362-63 (1978).

It follows, therefore, that the application of *Payton* by the district court to the cause herein was in accord with existing law on this issue and should be allowed to stand.

CONCLUSION

The decision of *Payton v. New York, supra,* was appropriately applied to the case sub judice by the District Court of Appeal of Florida, First District. There can be no rationale for attempting to apply *Payton* prospectively only. It was clearly foreshadowed by other decisions of state and federal cases, and is in accord with Fourth Amendment law of this nation.

It follows, therefore, that the Petition for Writ of Certiorari should be denied so that this cause may proceed in light of the ruling of the district court.

Respectfully submittted,

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